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No. 97-569

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN L. MAHALLATI
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CAROL CONNOR FLOWE*
MARC A. TENENBAUM
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Amicus Curiae
* Counsel of Record

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file the accompanying brief as *amicus curiae*.

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. This case concerns the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment committed by a supervisor. Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Accordingly, most of the Chamber's members are subject to Title VII and are potential defendants in sexual harassment cases.

An important function of the Chamber is to represent the interests of its members in litigation addressing issues of widespread concern to the American business community. Accordingly, the Chamber has participated as *amicus curiae* in several hundred cases before the Court. For example, the Chamber has filed briefs in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) — addressing the issue of employer liability for supervisory sexual harassment — as well as numerous other employment discrimination cases. *See, e.g., Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993);

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

On November 14, 1997, the Court granted certiorari in *Faragher v. City of Boca Raton*, No. 97-282, which presents the Court with an opportunity to resolve a conflict in the circuits regarding the circumstances under which an employer may be held liable for supervisory sexual harassment. In the accompanying proposed brief, the Chamber argues that the instant case may present the Court with a better vehicle for addressing that issue, and that this case presents an additional issue that independently warrants the Court's review. Accordingly, the Chamber urges the Court to grant certiorari in the instant case and, if appropriate, to consider it in tandem with *Faragher*.

Although Petitioner has consented to the Chamber's request for leave to file a brief in this case, Respondent has refused to consent. Accordingly, the Chamber moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN L. MAHALLATI
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CAROL CONNOR FLOWE*
MARC A. TENENBAUM
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Amicus Curiae

* Counsel of Record

Dated: December 1, 1997

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community.[1]

This case concerns the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment committed by a supervisor. Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Accordingly, most of the Chamber's members are subject to Title VII and are potential defendants in sexual harassment cases.

In recent years, the courts of appeals have become deeply divided on the standards governing employer liability for supervisory sexual harassment. As a result, an employer that does business in more than one part of the country may be subject to different standards of care under Title VII depending on the circuit in which the employee files suit. In addition, the unsettled state of the law has increased the cost of sexual harassment litigation, and has frequently served as an impediment to early settlements of such cases.

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[1] Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

On November 14, 1997, the Court granted certiorari in *Faragher v. City of Boca Raton*, No. 97-282, which involves a similar issue. The Chamber will be seeking leave to file a brief *amicus curiae* in *Faragher*, to assist the Court in adjudicating the merits of that case. The instant case, however, may provide the Court with a better vehicle to resolve the conflict among the circuits. Accordingly, the Chamber files this brief to urge the Court to grant certiorari in the instant case and, if appropriate, to consider it in tandem with *Faragher*.

ARGUMENT

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court held that an employer may be liable under Title VII for supervisory sexual harassment. The Court cautioned, however, that an employer is not "always automatically liable." *Id.* at 72. The Court expressly "declined . . . to issue a definitive rule on employer liability," leaving it to the lower courts to develop a standard. *Id.* The Court stated that "Congress wanted courts to look to agency principles for guidance in this area," but that such principles "may not be transferable in all their particulars to Title VII." *Id.* Over the course of the past decade, although every court of appeals has addressed this issue, the courts have failed to develop a consensus on an appropriate standard for employer liability.

Burlington Industries, Inc. ("Burlington") presents two questions in its petition for a writ of certiorari. One question is whether an employer is strictly liable for quid pro quo sexual harassment. The other question is whether a supervisor's request for sexual favors, accompanied by a threat of job consequences that is never implemented, constitutes quid pro quo or hostile environment sexual harassment. The two questions are necessarily intertwined, because the distinction between quid pro quo and hostile environment sexual

harassment generally has relevance only insofar as the two types of harassment are associated with different standards for imposing liability on the employer.[2/] If it is not necessary to distinguish between these two types of claims, then the single issue presented by the petition is simply what standard should be applied to determine whether an employer is liable for supervisory sexual harassment.

The lower courts have drawn a distinction between the employer liability standards applicable to these two types of sexual harassment. *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Canutillo Independent Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). In the instant case, the members of the Seventh Circuit could not agree whether there should be one standard for all sexual harassment claims, or whether there should be separate standards for quid pro quo harassment and hostile environment harassment. For example, Judge Easterbrook concluded that there should be only one standard because the statute does not dictate otherwise (Pet. App. 148a), while Judge Cudahy inferred from *Meritor* that, for purposes of evaluating employer liability, the two types of

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[2/]It is, of course, theoretically possible that a request for sexual favors accompanied by an unimplemented threat will stand alone, and will, therefore, not be actionable unless characterized as a quid pro quo claim. *See* Pet. App. 34a. In the instant case, however, as in the vast majority of cases, the alleged threat was merely one of many allegations of supervisory misbehavior. Thus, the characterization of the threat as quid pro quo rather than hostile environment sexual harassment will, in most cases, make a difference only if the standard for employer liability is different.

claims "might better be treated differently." (Pet. App. 29a.) And even those judges who agreed that there should be only one standard for all sexual harassment claims could not agree on what that standard should be. Judges Wood, Rovner and Easterbrook opined that employers should be strictly liable for *all* supervisory sexual harassment (Pet. App. 143a-148a, 174a-176a), while Judge Coffey argued strongly that Title VII is not in any respect a strict liability statute, and that imposing a strict liability standard, "in contrast with the more flexible and reasonable negligence standard, will preclude [courts] from accounting for `the circumstances of [each] particular case.'" (Pet. App. 63a (*quoting Meritor*, 477 U.S. at 73).)[3/]

If there is only one employer liability standard for all sexual harassment cases, then the *Faragher* case may provide the Court with an appropriate vehicle to determine that standard. *Faragher*, however, involves only hostile environment sexual harassment, while this case involves both hostile environment and quid pro quo harassment. Thus, this case will present the Court with an opportunity to address generally the question of employer liability in sexual harassment cases. In particular, the Court will have an opportunity to revisit its statement that courts should "look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. The disarray among the courts of appeals stems in large part from their disagreement over the significance of that phrase. For example, in evaluating whether a university could be held liable for sexual harassment perpetrated by a

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[3/]In a cross-petition filed on November 10, 1997, Respondent Ellerth presented the question the Court has now agreed to hear in *Faragher* — the standard for employer liability in hostile environment sexual harassment cases.

supervisory physician, the United States Court of Appeals for the First Circuit stated:

> The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere "guidance," but rather from its definitive refusal to find employers "always automatically liable."

Lipsett v. University of Puerto Rico, 864 F.2d 881, 900 (1st Cir. 1988) (citation omitted). Other courts, by contrast, have found it necessary to parse the language of the Restatement of Agency almost as if it were a statute — and those courts have reached conflicting results. *Compare Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994) (under negligence principles derived from the Restatement, "prompt and effective action by the employer will relieve it of liability") *with Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.) (under the Restatement, employer is strictly liable "if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"), *cert. denied*, 512 U.S. 1213 (1994).[4/]

[4/]*See also* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991) (discussing the technical legal flaws in the lower courts' efforts to apply traditional agency principles to sexual harassment, and noting that agency principles generally do not provide a legitimate basis for distinguishing between quid pro quo and hostile environment sexual harassment).

The *en banc* court in the instant case, mirroring the division among the circuits, issued eight separate signed opinions advocating a wide variety of standards ranging from strict liability to negligence. (Pet. App. 8a-207a.) A majority of the judges concluded "that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and that liability for quid pro quo harassment is strict . . . ." (Pet. App. 7a.) In reaching that result, some of the judges focused heavily on the Restatement of Agency, while others found that approach unhelpful. Chief Judge Posner expressed a particularly strong opinion on this subject:

> The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement* to employers' liability for sexual harassment by supervisory employees. . . .
>
> It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter — as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment — what the best regime of liability would be for these cases.

(Pet. App. 42a-43a.) *See also* Phillips, n.4, *supra* (arguing that the courts should abandon the use of agency principles in determining employer liability for sexual harassment).

In the instant case, the court below lamented its "inability to forge a majority position with regard to the proper standard for evaluating an employer's liability for sexual harassment by a supervisory employee," and indicated its hope that this Court "will bring order to the chaotic case law in this important field of practice." (Pet. App. 7a.) By granting certiorari in the *Faragher* case, the Court has recognized the importance of resolving the split in the circuits on the issue of employer liability. It appears that the amount in controversy in *Faragher*, however, is only one dollar, and that a ruling in that case could be akin to an advisory opinion.[5] *See, e.g., Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971) (claim for nominal damages alone does not constitute a "case or controversy" under Article III of the Constitution). In the instant case, by contrast, there is no question that there is a live controversy and that the Court's ruling would "affect the rights of litigants in the case." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Thus, the instant case may be a better vehicle for addressing the issue of employer liability.

In addition, if the Court concludes that it is necessary to apply one standard of employer liability to hostile environment claims and another to quid pro claims, then it would also be

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[5] "The district court entered judgment for Faragher on her Title VII claim against the City, awarding her $1 in nominal damages." *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997), *cert. granted*, No. 97-282 (U.S. Nov. 14, 1997). The Eleventh Circuit reversed, concluding that the City was not liable under Title VII. *Id.* at 1539. Thus, even if the Court were to reverse the Eleventh Circuit's decision, it appears that the effect would simply be to reinstate the district court's award of nominal damages.

helpful to provide the lower courts with guidance in defining these two terms. This issue is not presented in *Faragher*, because the plaintiff sought to recover only on a hostile environment theory.

The definition of quid pro quo harassment established by a majority of the Seventh Circuit in this case squarely conflicts with that of the District of Columbia Circuit. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995), the plaintiff alleged that her supervisor "repeatedly threatened her with adverse job consequences if she did not submit to his sexual advances . . . ." *Id.* at 1396. Although she never submitted, the supervisor did not carry out the threat. *Id.* The D.C. Circuit held that "it takes more than saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* At most, the court held, "a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors . . . may create or contribute to a hostile work environment." *Id.* In the instant case, by contrast, a majority of the *en banc* court held that "a clear and serious *quid pro quo* threat . . . can constitute an actionable claim even if the threat remains unfulfilled." (Pet. App. 17a.) For the reasons stated more fully in Burlington's petition, that issue also warrants plenary review by the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN L. MAHALLATI
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CAROL CONNOR FLOWE*
MARC A. TENENBAUM
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Amicus Curiae

* Counsel of Record

Dated: December 1, 1997